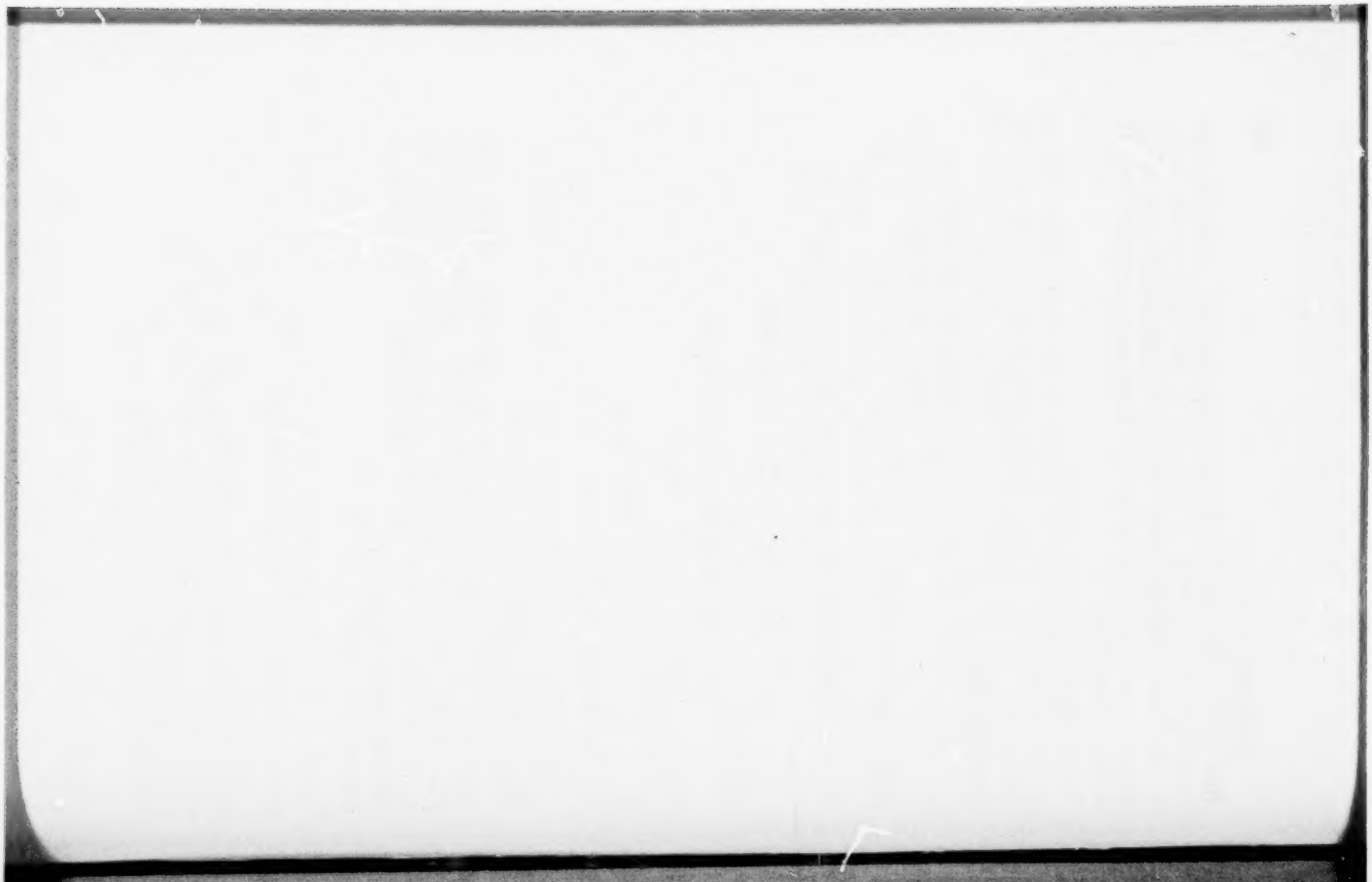

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JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

October Term, 1965
No. 531

UNITED STATES OF AMERICA,

Appellant,

vs.

BEN BLUE,

Appellee.

Motion to Dismiss Appeal or Affirm Decision of the United States District Court for the Southern District of California.

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Motion to Dismiss Appeal or Affirm Decision of the United States District Court for the Southern District of California.

The Appellee moves the Court to dismiss the appeal herein or in the alternative to affirm the judgment of the District Court on the grounds that this Court does not have jurisdiction and that it is clear that the questions on which the decision depends are unsubstantial and do not need further argument.

Opinion Below.

The Opinion of the Court of Appeals for the Ninth Circuit No. 20,007, Aug. 16, 1965 is reported in P-H 1965, par. 65,5175.. The District Court did not write an opinion.

Questions Presented.

1. DOES THE UNITED STATES HAVE AN APPEAL TO THIS COURT UNDER 18 U.S.C. 3731 WHERE THE DISTRICT COURT HAS DISMISSED AN INDICTMENT, WHICH JUDGMENT IS NOT BASED ON THE INVALIDITY OR CONSTRUCTION OF A STATUTE BUT ON THE GROUND THAT THE DEFENDANT, UNDER THE CIRCUMSTANCES, COULD NOT HAVE A FAIR TRIAL?

2. IS THE DECISION OF THE DISTRICT COURT ONE "SUSTAINING A MOTION IN BAR", THE DEFENDANT NOT HAVING BEEN PUT IN JEOPARDY?

3. SHOULD THE JUDGMENT OF THE DISTRICT COURT BE AFFIRMED ON THE GROUND THAT THE QUESTION IS SO UNSUBSTANTIAL AS NOT TO WARRANT FURTHER ARGUMENT?

Statement.

On Motion of defendant Ben Blue, the District Court dismissed a six count indictment against Blue (for tax offenses) on the principal ground that the defendant could not have a fair trial.

Defendant Blue was indicted on August 6, 1964. One and one-half years prior to this, November 2, 1962, Blue had been advised by the local Chief of the Intelligence Division that consideration was being given to the institution of criminal procedure. On April 9, 1963 a jeopardy assessment was made against Blue and Merry-Go-Round, Inc., his wholly owned corporation,

for deficiencies in income and excise taxes in the total amount of $272,276.63.

The District Court found that Blue was unable to pay the taxes and accordingly determined that he was compelled under the provisions of the Internal Revenue Code to file a *verified* petition in the Tax Court of the United States in order to protect his property.

At the time of the indictment, therefore, Blue had previously been compelled to file a verified statement of facts regarding tax on the same income for the same years involved in the indictment.

At the time of the dismsisal of the indictment the following colloquy occurred, "Mr. Schulman: Is your Honor discussing the constitutionality in deciding this? The Court: No." [R. T. pp. 148, 149.] The Court also stated:

> "I am much bothered, however, by the fact that the jeopardy assessment was filed after the Internal Revenue Bureau had decided that it was going to proceed criminally, and was proceeding to investigate him criminally, and levied the jeopardy assessment, and that under the law he is compelled to come forward with whatever proof he has and whatever facts he has concerning the same years and concerning whether or not there was fraud or whether it was wilful in the Tax Court, whether or not that isn't a violation of his right to not be compelled to be a witness against himself." [R. T. p. 144.]

On appeal of the dismissal by the Government the Ninth Circuit certified the appeal to this Court. The Government has not filed a statement of jurisdiction.

The only ground on which this Court would appear to have jurisdiction, since there is no constitutional question involved, is that it is a direct appeal under §3731 of Title 18 "from the decision or judgment sustaining a Motion in Bar," Blue not having been put in jeopardy. As will be more fully discussed later, the dismissal of the indictment herein was in the interests of justice (analogous to one under Rule 48(b) of the Federal Rules of Criminal Procedure) and not as a result of a motion in bar. This is clearly not a situation in which there was former acquittal, former conviction or pardon which traditionally were the grounds for a plea in bar.

It should be noted that the Government's notice of appeal herein is captioned "Appellant, United States of America hereby appeals from the said order of February 8, 1965 dismissing the indictment herein." [R. T. p. 164.] Form 26 of the Federal Rules of Criminal Procedure requires that the appellant name the Court to which the appeal is taken. The Notice of Appeal in this respect is therefore defective.

The District Judge specifically mentioned that he relied on *Boyd v. United States,* 116 U.S. 616 and *United States v. Heath,* 260 F. 2d 623 (CA-9, 1958) and that he considered "the circumstances peculiar to this case," in dismissing the indictment. [R. T. p. 144, line 22.] The record is bare of any evidence supporting the reason for making a jeopardy assessment and the Chief, Intelligence Division, Internal Revenue Service, Los Angeles District, testified as follows:

> "A. Civil liabilities generally are not assessed until after the criminal phases of the case have been disposed of." [R. T. p. 85.]

He further testified:

"Q. Do you know of any other case besides the Ben Blue case in the last year that a jeopardy assessment has been levied on after a criminal investigation had been started? A. I can't recall of any, but there might have been.

Q. Do you review these recommendations? A. I do." [R. T. p. 89.]

The situation before the District Court was indeed unique. Blue had been compelled to file a verified petition in the Tax Court to protect his property and then fourteen months later, after the petition had been forwarded to the prosecutive authorities the indictment was brought. The following colloquy between the Court and Government Counsel regarding the disposition of the verified petition reveals the court's concern about this feature of the case:

"The Court: I have no idea, counsel, and I cannot reach that until we get to it. All I am saying is that now it has been established that the petitioner, the defendant in this case, did file in the Tax Court before the matter was presented to the Grand Jury a verified petition, and all I am ordering now is that you produce a copy of that petition, if you have it.

Mr. Schulman: I will stipulate, your Honor, that each of the petitions filed by Ben Blue, Ben Blue and Axie Blue and Merry-Go-Round which has been referred to in the testimony so far are presently a part of the United States Attorney's case file.

The Court: And came with the Special Agent's report?

Mr. Schulman: They came to us with the report when it was referred to us from the Department of Justice."

The District Court was not passing upon some generalized or hypothetical situation but on the effect on Ben Blue of the actions of Government officials under "circumstances peculiar to this case." [R. T. p. 144.]

The Court did not rule upon the constitutionality of the sections under which Ben Blue was indicated or the Code provisions for jeopardy assessments. The Court simply concluded that under the circumstances peculiar to the Ben Blue prosecution the defendant could not have a fair trial.

ARGUMENT.

This Court in *United States v. Mersky,* 361 U.S. 431 expressly refused to decide whether the appeal involved a plea in bar. It held that the appeal had to do with the construction of a statute and stated "in view of this conclusion, we need not pass upon the claim that the District Court sustained in effect a 'Motion in Bar'" (at page 438). In separate opinions Justices Brennan and Whittaker stated that they were of the opinion that the Court had sustained a plea in bar. Justice Stewart in a dissenting opinion in which Justices Frankfurter and Harlan joined, said that the case was not one which involved either the invalidity or the construction of the statute. They were further of the opinion that the case did not involve a Motion in Bar.

Regarding *United States v. Storrs,* 272 U.S. 652 and *United States v. Hark,* 320 U.S. 531, Justice Frankfurter in his dissent said,

> "In Hark the Court did not notice the Storrs analysis and gave a colloquial meaning to the phrase. Having to choose between these two decisions, I follow Storrs because it applied the appropriate criterion of construction." (at page 453).

This Court recognized in its opinion in *United States v. Murdock,* 284 U.S. 141, the traditional test of a plea in bar. It said:

> "A special plea in bar is appropriate where defendant claims former acquittal, former conviction, or pardon (2 Bishop New Criminal Procedure (2d Ed.) §§742, 799, 805 et seq.) but there is no warrant for its use to single out for determination in advance of trial matters of defense either on questions of law or fact."

The right of the Government to appeal in a criminal case is not favored. *Carroll v. United States,* 354 U.S. 394, 400, 1 L. Ed. 2d 1442, 1446, 77 S. Ct. 1332, 1336; *United States v. Apex Distributing Co., Inc.,* 270 F. 2d 747, 749, 751 (CA-9, 1959); *United States v. Heath,* 260 F. 2d 623 (CA-9, 1958).

If the restrictions on appeal should be relaxed it seems not to call for judicial remedy but for action by the legislature. This Court noted in the *Carroll* case:

> "It is the function of the Congress to decide whether to initiate a departure from the historical pattern of restricted appellate jurisdiction in criminal cases." (Fn. 27.)

And furthermore, we may be mindful of the fact that if the lower Court commits an egregious error the extraordinary writ of mandamus is available to prevent a miscarriage of justice.

Last year this Court handed down the decision of *Malloy v. Hogan,* 378 U.S. 1, 12 L. Ed. 2d 653 (1964). That case held that a defendant had the right to claim the privilege against self-incrimination in State investigatory proceedings, where the testimony he would have been required to give would not incriminate him under State law but where there was possible incrimination under Federal law. In the course of the opinion, the majority decision referred to the case of *Boyd v. United States,* 116 U.S. 616 (1886) as that "great case" and relied heavily upon the tenets and theories therein set out. This Court said:

> "In thus returning to the *Boyd* view that the privilege is one of the 'principles of a free Government' 116 U.S. 632. *Mapp v. Ohio,* 367 U.S. 643

> necessarily repudiated the *Twining v. New Jersey,* 211 U.S. 78 concept of the privilege as a mere rule of evidence 'best defended not as an unchangeable principle of universal justice but as a law proved by experience to be expedient' 211 U.S. 113."

The *Boyd* case is particularly applicable in the instant situation. That decision involved an information filed by the United States for forfeiture of goods under a statute providing for fines from $50 to $5,000 and two years imprisonment or both, together with forfeiture of goods, if any owner or importer should, with intent to defraud the revenue, make, or attempt to make, entry of imported merchandise by means of fraudulent invoices, affidavits, letters of false statements or by any act whereby the Government was deprived of its lawful duties on said merchandise. The plaintiffs in error claimed the goods in question and the quantity and value of 29 cases of merchandise previously imported became a material issue. The District Attorney offered an order directing production of the invoice for the previous shipment from the claimants. The claimants produced the invoice but objected that in a suit for forfeiture, no evidence could be compelled for claimants. Had the invoice not been produced, the document would have been assumed to read as contended by the District Attorney.

It was held that the procedure used was an unlawful search and seizure under the Fourth Amendment because it compelled the claimant to testify against himself.

> "Breaking into a house and opening boxes and drawers are circumstances of aggravation, but any

> forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of (the Fourth and Fifth Amendments). 116 U.S. 616, 630."
>
> "It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient and effects the sole object and purpose of search and seizure."

It is not as though the defendant here is being treated the same as defendants in other criminal tax cases. There is a long standing policy of the Internal Revenue Service not to institute any kind of assessment proceedings against a man who is to be prosecuted criminally. This policy was not followed in the instant case and no explanation for the deviation appears in the record of this case. There are several recent decisions concerning the necessity of equality in the administration of rights given by statute in criminal cases although those rights are not required to be extended by the due process clause of the Fourteenth Amendment. Thus in *Griffin v. Illinois,* 351 U.S. 18, there was in question the practice of the State of Illinois to require payment for the transcript of the record on appeal. If an indigent defendant did not have the money to purchase the transcript, he could not make the appeal. The Court said that while the due process clause does not require a right to appeal, if it is given in due course,

the right cannot be made to depend upon the financial ability of the defendant to pay for it. And in *Douglas v. California,* 372 U.S. 353, the indigent defendants were convicted in the lower State Court and requested the appointment of counsel for appeal. The California Appellate Court, as it was required to do under *People v. Hyde,* 51 Cal. 2d 152, 154, reviewed the record of the trial and decided that "no good whatever could be served by appointment of counsel" for the appeal. The Supreme Court held that a State may not grant Appellate review in such a way to discriminate against some convicted defendants on account of their poverty. Other cases with similar decisions in recent years are *Draper v. Washington,* 372 U.S. 487 and *Coppedge v. United States,* 369 U.S. 438.

In dismissing the indictment in this case the District Court did not sustain a plea in bar on the traditional ground of former acquittal, former conviction or pardon but exercised its inherent power to do justice. It specifically referred to the peculiar circumstances of the case and cast no shadow on the statutory structure of the Internal Revenue Code. The Government has many criminal and civil sanctions which it may impose and its power may be freely and efficiently exercised to protect the revenue without denying a defendant a fair trial. The decision of the District Court was clearly right and no substantial question is presented on this appeal. In exercising its inherent power to do justice the Court dismissed the indictment and such a judgment is not reviewable by this court under Sec. 3731 of Title 18 U.S.C.

Conclusion.

It is submitted that this Court does not have jurisdiction of the appeal and that the Motion to Dismiss should be granted.

In the alternative it is contended that the questions presented by this appeal are unsubstantial and that the judgment of the District Court should be affirmed.

Respectfully submitted,

ERNEST R. MORTENSON,

Counsel for Appellee.

Dated: 28th day of October, 1965.